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No. 89-1076

In the Supreme Court of the United States

OCTOBER TERM, 1989

RAY L. CORONA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the verdict of the jury that convicted petitioner on two RICO counts showed that it necessarily had relied on valid predicate acts of racketeering, even though some of the predicate acts alleged at trial were subsequently determined to be invalid.

2. Whether, following his conviction after a second trial, petitioner is entitled to review of his contention that the evidence was insufficient at his first trial, which ended in a mistrial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 885 F.2d 766.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1989. A petition for rehearing was denied on November 13, 1989 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on January 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was con-

victed under the Racketeer Influenced and Corrupt Organizations Act (RICO) of operating a racketeering enterprise and conspiring to do so, in violation of 18 U.S.C. 1962(c) and (d); on three counts of mail fraud, in violation of 18 U.S.C. 1341; and on two counts charging violations of the Travel Act, 18 U.S.C. 1952. After trial, the district court upheld the RICO and Travel Act convictions, but directed a judgment of acquittal as to the mail fraud counts in light of *McNally* v. *United States*, 483 U.S. 350 (1987). Pet. App. 21a-23a. The court of appeals affirmed the convictions on the two RICO counts and one of the Travel Act counts, but reversed the conviction on the other Travel Act count. Pet. App. 1a-18a.

1. Petitioner and his father were, respectively, the vice president and president of the Total Bank in Miami, Florida. In 1976, petitioner became the banker for Jose Fernandez, a major marijuana trafficker in South Florida. Petitioner obtained a credit card for Fernandez even though Fernandez had no credit history and the legitimate business that he ran was not very profitable. As collateral for the card, Fernandez gave petitioner $20,000 in cash wrapped in a paper bag. Pet. App. 2a-3a.

In 1977, Fernandez determined that his businesses would prosper if he owned a bank. Fernandez and his associates discussed buying a bank with petitioner and decided that the purchase should be made in the names of "figurehead" owners to conceal Fernandez's interest from banking authorities. Petitioner and two other persons—Alma Robles, the ex-wife of Fernandez's trusted associate, Steve Samos, and another associate of Fernandez—were selected to be the bank's nominal buyers. Petitioner and his father subsequently learned that the Sunshine State Bank in Miami was for sale. Petitioner's father negotiated the sale. On December 21, 1977, Samos wired $900,000 from Panama to an account controlled by petitioner for

the purchase of the bank (Racketeering Act #20). In January 1978, the sale agreement was executed. In May, the State approved the sale, but directed the buyers to invest an additional $1.1 million in the bank to complete a tender offer to minority shareholders. On May 10, Samos wired $600,000 into an account controlled by petitioner (Racketeering Act #21). On May 16, an additional $550,000 was wired to petitioner's account (Racketeering Act #22). That money came from drug proceeds that Samos had laundered in Panama. During May, petitioner and his father sent three letters that related to the purchase of the bank through the United States mails (Racketeering Acts #34-#36). Petitioner was made President and Chairman of the Board of the Sunshine State Bank, but he subsequently relinquished the latter position to his father. Pet. App. 3a-4a; Gov't C.A. Br. 8-11.

In March 1981, Fernandez was arrested on federal drug charges and confined in New Orleans, Louisiana. Several days later, petitioner traveled to New Orleans and met both Fernandez and Fernandez's local attorney, ostensibly to help Fernandez make bail (Racketeering Act #17; Count VI (Travel Act)). Petitioner returned to Miami, however, after Fernandez said that petitioner's presence might reveal Fernandez's connection with the Sunshine State Bank to federal agents. Pet. App. 5a.

Shortly afterwards, Fernandez was released on bail, but he and his family were kidnapped and taken to Colombia by a Colombian drug family to whom Fernandez owed drug debts. The Colombians forced Fernandez to liquidate most of his holdings to pay his debts. During his captivity, Fernandez, through Samos and others, negotiated the sale of his bank shares to petitioner and his father. In June 1981, Fernandez sold 49,900 shares to petitioner and his father for $200,000 and a note for $420,000. Petitioner sent a $200,000 check to Robles in Panama, which was

cashed and given to Fernandez (Racketeering Act #37; Count III (mail fraud)).

In August 1981, Fernandez escaped from captivity and fled to Brazil. From Brazil, he continued to negotiate the sale of his interest in the bank to petitioner and his father, selling them an additional 9,900 shares for $200,000. In December 1981, Fernandez convinced petitioner to pay him an additional $50,000. On December 22, 1981, Samos called petitioner from Panama and provided him with the name of the company to which the checks would be made payable (Racketeering Act #18; Count VII (Travel Act)). Petitioner sent $50,000 in cashier's checks to one of Fernandez's companies in Panama (Racketeering Act #38; Count IV (mail fraud)). Pet. App. 6a; Gov't C.A. Br. 24. In April 1982, after Fernandez persuaded petitioner to make an additional payment, the Sunshine State Bank sent a $30,000 check to Samos in Panama (Racketeering Act #39; Count V (mail fraud)). Gov't C.A. Br. 25.

2. Petitioner and his father were tried on RICO and RICO conspiracy charges, and on multiple counts alleging violations of the mail and wire fraud statutes and the Travel Act. After the jury could not agree on a verdict following lengthy deliberations, the court declared a mistrial.

Three months later, the government obtained a superseding indictment from the grand jury, which charged petitioner with RICO, RICO conspiracy, three counts of mail fraud, and two counts alleging violations of the Travel Act. The superseding indictment did not change the general thrust of the RICO counts. *United States* v. *Corona*, 804 F.2d 1568, 1569 (11th Cir. 1986), cert. denied, 481 U.S. 1017 (1987). The RICO counts alleged 11 predicate racketeering offenses: (a) the three 1977-1978 Travel Act offenses that related to the wiring of laundered funds from Samos to petitioner to buy the Sunshine State

Bank (Racketeering Acts #20-#22); (b) the three 1978 mail fraud offenses that also related to the purchase of the Sunshine State Bank (Racketeering Acts #34-#36);[1] (c) the 1981 Travel Act offense relating to petitioner's trip to New Orleans to help Fernandez make bail, which was also charged as Count VI (Racketeering Act #17);[2] (d) the three 1981 mail fraud offenses relating to Fernandez's sale of his shares in the Sunshine State Bank and the transfer of money from petitioner to Fernandez while he was a fugitive, which were also charged as Counts III-V (Racketeering Acts #37-#39);[3] and (e) the 1981 Travel Act offense relating to petitioner's transfer of $50,000 to Fernandez while he was a fugitive, which was also charged as Count VII (Racketeering Act #18).

Prior to retrial, petitioner moved to dismiss the superseding indictment on double jeopardy grounds. The district court denied the motion. On interlocutory appeal, the court of appeals rejected petitioner's double jeopardy challenge, holding that petitioner could be retried because the earlier mistrial had not ended the jeopardy that had attached at petitioner's first trial. *United States* v. *Corona*, 804 F.2d at 1570-1571.

Petitioner went to trial and was convicted on all seven counts. Two days after the verdict, this Court held in *McNally* that the mail fraud statute, 18 U.S.C. 1341, did not reach schemes to defraud persons of "intangible right[s]."[4] Based on *McNally*, petitioner moved for a new

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[1] It is agreed that, in light of *McNally*, the RICO convictions cannot rest on these three predicate acts. See Pet. App. 2a, 8a.

[2] Petitioner's conviction on this count was subsequently overturned by the court of appeals. Pet. App. 13a.

[3] The district court subsequently overturned petitioner's convictions on the three mail fraud counts in light of *McNally*. Pet. App. 2a.

[4] Congress recently amended the federal fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to

trial and a judgment of acquittal. The district court upheld petitioner's convictions on the two RICO and the two Travel Act counts, but overturned petitioner's convictions on the three mail fraud counts. Pet. App. 21a-23a.

3. The court of appeals affirmed the two RICO convictions and one of the two Travel Act convictions. Pet. App. 1a-18a.[5] The court first determined that the evidence showed that petitioner knew that Fernandez was involved in marijuana trafficking, citing petitioner's knowledge that Fernandez had acquired a substantial amount of wealth without any apparent legitimate source for it; petitioner's knowledge that Fernandez wanted a "figurehead" buyer for the Sunshine State Bank and that he had laundered the funds used to buy it; petitioner's conversations with Fernandez and his associates concerning the sources and amounts of their incomes; petitioner's receipt of expensive gifts and large loans from Fernandez; and petitioner's advice to Fernandez to use a "front" business for investment purposes. Pet. App. 11a-12a. The court also held that the evidence showed that petitioner had participated in the distribution of drug proceeds by helping

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deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988).

[5] With respect to the Travel Act convictions, the court held that the evidence was sufficient to sustain petitioner's conviction on Count VII, which related to the $50,000 petitioner sent Fernandez in December 1981 while he was a fugitive. Pet. App. 13a. But, by a divided vote, it reversed petitioner's conviction on Count VI, holding that petitioner's trip to New Orleans to help Fernandez make bail did not facilitate the enterprise. *Ibid.* The correctness of the court's rulings on the Travel Act counts is not at issue.

Fernandez buy the Sunshine State Bank with the profits from his marijuana trafficking business. *Id.* at 13a-14a.

The court then held that the jury had properly concluded that petitioner had engaged in a pattern of racketeering activity, even though seven of the 11 charged RICO predicate acts had been invalidated. Pet. App. 16a-17a. It was clear that the jury had properly relied on predicate act #18, the Travel Act offense on which petitioner had been separately charged (Count VII) and convicted, since the court had upheld that conviction. The court concluded that it was also clear that the jury had properly relied on the three 1977-1978 Travel Act offenses that were not separately charged, emphasizing the relationship between the mail fraud counts on which the jury had convicted petitioner and the 1977-1978 Travel Act offenses. The court explained that petitioner had conceded that the sole issue at trial with respect to the mail fraud offenses and the 1977-1978 Travel Act offenses was whether petitioner knew that Fernandez was the true investor in the Sunshine State Bank. *Id.* at 16a-17a. Since the jury had convicted petitioner on the mail fraud counts, the court concluded that "[t]he jury plainly found that [petitioner] knew Fernandez was the person whom [petitioner] helped buy the bank stock and from whom [petitioner] later purchased it." *Id.* at 17a. Therefore, the court concluded that the jury could not reasonably have convicted petitioner on the mail fraud counts "without also finding [petitioner] guilty of the related Travel Act predicates." *Ibid.* Judge Vance dissented on this point. *Ibid.*

Finally, relying on *Richardson* v. *United States*, 468 U.S. 317 (1984), and its previous decision in this case, the court rejected petitioner's contention that his retrial following a mistrial due to a hung jury violated the Double Jeopardy Clause. Pet. App. 15a-16a.

ARGUMENT

1. To obtain a conviction under RICO, the government must show that the defendant engaged in a "pattern of racketeering activity," which is defined as "at least two acts of racketeering activity." 18 U.S.C. 1961(5). Since seven of the 11 charged RICO predicate acts have been invalidated, petitioner contends (Pet. 7-15) that his RICO convictions must be reversed because the jury may have relied on the invalid predicate acts in convicting him. Based on the jury's verdict, however, the court of appeals correctly decided that the jury must have found that petitioner committed the four valid predicate acts.

a. Where a jury is instructed that it may convict on multiple grounds, and one of those grounds is later determined to be invalid, the conviction may stand only if the reviewing court can be certain that the actual ground relied on by the jury was a proper ground. If the reviewing court is not certain of the actual ground relied on by the jury, the conviction must be reversed. See *Street* v. *New York*, 394 U.S. 576, 585-588 (1969); *Stromberg* v. *California*, 283 U.S. 359, 367-370 (1931); see generally *Zant* v. *Stephens*, 462 U.S. 862, 880-884 (1983). In this case, the court of appeals correctly determined that the jury necessarily found that petitioner committed the four valid predicate acts charged. That is sufficient to uphold his RICO convictions.

First, the court of appeals properly determined that the jury's conviction on Count VII (the Travel Act violation relating to a 1981 telephone call in which petitioner was directed to send money to Fernandez) necessarily constituted a finding that petitioner had committed Racketeering Act #18, because Racketeering Act #18 incorporated the Travel Act allegations of Count VII. The jury's verdict on Count VII thus operated in effect as a

special verdict that petitioner committed Racketeering Act #18. See *Brennan* v. *United States*, 867 F.2d 111, 114-116 (2d Cir.), cert. denied, 109 S. Ct. 1750 (1989); *United States* v. *Kragness*, 830 F.2d 842, 861 (8th Cir. 1987); *United States* v. *Anderson*, 809 F.2d 1281, 1284-1285 (7th Cir. 1987); *United States* v. *Lopez*, 803 F.2d 969, 976-977 (9th Cir. 1986), cert. denied, 481 U.S. 1030 (1987); *United States* v. *Pepe*, 747 F.2d 632, 668 (11th Cir. 1984); *United States* v. *Peacock*, 654 F.2d 339, 348 (1981), modified, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983).

Second, the court of appeals correctly held that the jury's verdict on the mail fraud counts indicated that it must have found that petitioner had committed the other three predicate Travel Act offenses by its verdict on the mail fraud counts. As petitioner conceded in the court of appeals (Pet. App. 16a-17a), the only relevant issue at trial was whether petitioner knew that he was fronting for Fernandez when he bought the Sunshine State Bank. By its verdict, the jury showed that it had concluded that petitioner did know that fact, since it was an essential element of the scheme alleged in the mail fraud counts.[6] Thus, the mail fraud counts subsumed the three Travel Act predicate acts, which were based on transfer of funds from Fernandez's accounts to petitioner's accounts during the

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[6] Those counts charged that petitioner had schemed to locate a bank in South Florida "which could be acquired through nominees by the co-conspirators Jose Antonio Fernandez and Gerardo Jorge Guevara, as hidden owners, with the proceeds of the Fernandez marijuana smuggling syndicate." Indictment at 40, Counts III-V, para. 3(a). The mail fraud counts further alleged that petitioner transferred funds "in order to create the false appearance that the Panamanian nominee was the true purchaser of the majority interest in the stock of the Sunshine State Bank." *Ibid.* Counts III-V, para. 3(d).

negotiations leading to the purchase of the Sunshine State Bank.[7]

Petitioner also contends (Pet. 12-14) that the decision below ignores this Court's recent decision in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), which held that RICO's requirement of a pattern of racketeering activity means that the predicate acts must be related and constitute a threat of continuing racketeering activity. There is no question that the predicate acts in this case constituted such a pattern. The 1977-1978 Travel Act offenses each furthered the common objective of buying the Sunshine State Bank under false pretenses with the proceeds of Fernandez's marijuana business. And the 1981 Travel Act offense was related to the other three in that it helped Fernandez evade punishment for selling the illegal drugs. Thus, all of the offenses posed the threat of con-

[7] Departing from his position in the court of appeals, petitioner now contends (Pet. 6-7 & n.4) that the predicate Travel Act violations and the mail fraud convictions involved different factual issues. There is no merit to those contentions. Petitioner first observes that the mailings in furtherance of the mail fraud scheme occurred in 1981 and 1982, while the Travel Act predicate acts occurred in 1977 and 1978. Petitioner overlooks the fact that the gist of the mail fraud charges involved the purchase of the Sunshine State Bank in 1978 by means of false pretenses. Petitioner also contends that he did not know that Fernandez was a marijuana dealer until 1981, after the commission of the predicate Travel Act offenses. As the court of appeals concluded, however, the jury had more than ample evidence to conclude otherwise. Pet. App. 11a-12a. In addition, petitioner now argues that the jury made no specific finding that petitioner obtained a distribution of the proceeds of Fernandez's marijuana business. But the mail fraud counts alleged that petitioner schemed to buy a bank with the proceeds of Fernandez's marijuana business while concealing that Fernandez was the true owner (Indictment at 40, Counts III-V para. 3(a) and (d)), and petitioner received stock in the bank as part of the deal.

tinued racketeering activity because they furthered Fernandez's marijuana business.

b. The court of appeals' determination that the jury necessarily found that petitioner committed the valid Travel Act predicate acts, even though the jury made no express findings on them, is consistent with the approach of other courts of appeals. For example, *United States* v. *Zauber*, 857 F.2d 137 (3d Cir. 1988), cert. denied, 109 S. Ct. 1340 (1989), involved a RICO charge that alleged invalid mail and wire fraud predicate acts and valid kickback predicate acts. As in this case, the indictment linked the mail and wire fraud schemes and the kickbacks. Furthermore, although the mail fraud violations were charged separately as substantive offenses, the kickbacks were not charged separately, except as to one defendant. The court of appeals affirmed all of the defendants' RICO convictions. Analyzing the record and the jury instructions, the court concluded that the jury necessarily found that the defendants had committed the valid kickback violations. 857 F.2d at 151-154. Similarly, in *Callanan* v. *United States*, 881 F.2d 229, 234-235 (6th Cir. 1989), petitions for cert. pending, Nos. 89-6184 & 89-6203 (filed Dec. 1 and 2, 1989), a RICO case that involved invalid mail fraud predicate acts and valid bribery predicate acts, the court of appeals held that the jury's conviction of a co-defendant on RICO charges based on bribery with the defendant constituted, in effect, a special verdict that the defendant had committed the valid predicate acts.

Contrary to petitioner's contention (Pet. 11-14), the Third Circuit does not automatically reverse RICO convictions when a predicate act is subsequently found invalid. Petitioner's reliance on *United States* v. *Brown*, 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), is therefore misplaced. In that case, the court of appeals, pursuant to a government concession, reversed the de-

fendant's RICO conviction following the invalidation of two underlying predicate mail fraud violations. As the Third Circuit subsequently explained in *Zauber* (857 F.2d at 154), the RICO conviction in *Brown* had to be reversed because "it was impossible to determine whether the jury had relied on invalid predicate acts."[8]

Petitioner's contention (Pet. 8-10) that the decision below conflicts with the decisions of other courts of appeals is also without merit. Contrary to petitioners' contention, none of the decisions on which he relies held that where a predicate racketeering act has been determined to be invalid, the RICO conviction will be sustained only if the jury made an express finding of guilt on at least two other predicate acts. Rather, each court has reversed only after finding that the record was unclear as to whether the jury had found two valid predicate acts showing a pattern of racketeering activity. Thus, in *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984), the court reversed a RICO conviction because it could not "tell from its verdict * * * what decisions [the jury] made with respect to the eight predicate acts." The court distinguished cases like this one, where "the court was assured by the separate convictions that the jury had found defendant guilty of committing at least two of the predicate acts alleged in the indictment." 726 F.2d at 922. Similarly, in *United States* v. *Kragness*, 830 F.2d at 861, the court stated that "we cannot know from the jury's general verdict of guilty which acts it found [the defendant] had committed." And in *United States* v. *Mandel*,

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[8] In *McCullough* v. *United States*, cert. denied, 484 U.S. 947 (1987), Justices White and Brennan would have granted certiorari to resolve a conflict between *Brown* and cases from other circuits concerning the effect of the invalidation of a predicate racketeering act on a racketeering conviction. In light of *Zauber*, the Third Circuit is no longer in conflict with the other circuits.

862 F.2d 1067, 1074 (4th Cir. 1988), cert. denied, 109 S. Ct. 3190 (1989), the court reversed a RICO conviction because it could not determine "whether the [invalid] mail fraud or the [valid] bribery charges of Count 21, or both, were considered by the jury." Under the facts of this case, in contrast, the court of appeals was able to conclude that "the verdict leaves no doubt that the jury relied on at least two valid predicate acts." Pet. App. 16a.

2. Petitioner also contends (Pet. 15-17) that the court of appeals erred by not evaluating the sufficiency of the evidence at his first trial, which ended in a mistrial. There is no merit to that claim. In *Richardson* v. *United States, supra*, the Court stated that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." 468 U.S. at 325. The Court further held that "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which the defendant was subjected." *Id.* at 326. The Court added that "there is no possibility that a defendant's double jeopardy rights will be violated by a new trial" following a mistrial. *Id.* at 326 n.6. Accordingly, the court below correctly concluded, as it had in its previous decision in this case, that "the mistrial due to a hung jury in the first trial did not terminate jeopardy," Pet. App. 15a, so that petitioner's "double jeopardy claim has no merit," *id.* at 16a.

No court of appeals has interpreted the Double Jeopardy Clause differently in light of *Richardson*. To the contrary, they have recognized, like the court below, that their "task is limited to considering the sufficiency of the evidence at the second trial." *United States* v. *Coleman*, 862 F.2d 455, 460 (3d Cir. 1988), cert. denied, 109 S. Ct. 2074 (1989); *United States* v. *Kimberlin*, 805 F.2d 210, 230 (7th Cir. 1986), cert. denied, 483 U.S. 1023 (1987). In the

absence of any conflict among the circuits with respect to the proper application of this Court's decision to double jeopardy claims raised after a second trial, there is no need for this Court to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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